

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

11644. Renterman

FILE: B-193874

DATE: October 11, 1979

MATTER OF: Vector Engineering, Inc.

DIGEST: [Protest of Contract Award under
Architect and Engineering Set-Aside]

1. GAO will review 8(a) set-aside determination where question is whether relevant rules and regulations have been followed by agencies involved.
2. Award of architect and engineering contracts are governed by provisions of Brooks Bill, 40 U.S.C. § 541 et seq. (1976), notwithstanding that zone of competition eligible for award may be legally limited by Small Business Administration's 8(a) program established pursuant to 15 U.S.C. § 637(a) (1976), as amended.

Vector Engineering, Inc. (Vector), protests the award of a contract by the Department of Commerce (Commerce) under request for proposals (RFP) No. NA79SAM0618 VA. The contract was advertised in the Commerce Business Daily (CBD) of December 14, 1978, as a 100% 8(a) set-aside for architect and engineering (A&E) services for the technical support of the National Oceanographic and Atmospheric Administration's (NOAA's) facilities construction program.

The CBD notice stated:

"R--ENGINEERING ANALYSIS, SPECIALIZED CONSULTATION, COST ESTIMATES AND RELATED A & E SERVICES, for support of NOAA's construction of facilities program. 100% set aside for 8A Certified Firms. * * * Request RFP NA79SAM0618VA in writing to the following address with due date 5:00 p.m. EST, 12-18-78; Department of Commerce Procurement Office, Washington, D.C. 20230, Attn: Rm. 6518, NA79SAM0618 * * *.

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Facility construction
Contract award protest
Procurement procedures
Small business
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Vector protested to Commerce on the grounds that an 8(a) set-aside was inconsistent with the requirement that contracts for A&E services be negotiated in accordance with the specific criteria set forth in the Brooks Bill, 40 U.S.C. § 541 et seq. (1976), and that Commerce did not have delegated authority from the Small Business Administration (SBA) to solicit 8(a) contractors. Commerce agreed with the latter contention and SBA nominated 8(a) firms for the contract without regard to the CBD advertisement or the requirements of the Brooks Bill. Vector has since withdrawn this objection to the proposed award.

As its basis for protest to our Office, Vector contends that the general criteria used to establish eligibility for participation in the 8(a) program, established by section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) et seq. (1976), are inconsistent with the specific criteria in the Brooks Bill and therefore that the SBA cannot lawfully authorize an 8(a) set-aside for A&E services. We disagree.

The position of Commerce and SBA, as indicated by the record, is that SBA has independent statutory authority pursuant to section 8(a) to contract with Federal agencies and to subcontract with socially and economically disadvantaged business concerns, and that the Brooks Bill does not apply to contracts negotiated pursuant to SBA's 8(a) authority.

We note at the outset the general rule that in view of the broad discretion accorded SBA under 8(a) to enter into contracts with procuring agencies for the purpose of letting subcontracts, this Office will not review decisions to set aside procurements under the 8(a) program absent a showing of fraud on the part of Government officials or such willful disregard of the facts by Government officials as to necessarily imply bad faith. Automation Information Data Systems, Inc., B-185055, June 15, 1976, 76-1 CPD 377. We will review such set-aside decisions, however, where the question is whether relevant rules and regulations have been

followed by the agencies involved. Delphi Industries, Inc.--request for reconsideration, B-193212, January 30, 1979, 79-1 CPD 70. Accordingly, we believe that our review is appropriate in the instant case.

Prior to 1978, section 8(a) of the Small Business Act authorized SBA to enter into contracts with Federal agencies for the purchase of equipment, supplies, materials or services. SBA was empowered by 8(a) to let subcontracts to small business concerns and others to perform such contracts. SBA, by administrative regulation at 13 C.F.R. § 124 et seq. (1978), used the 8(a) authority to channel Federal contracts to socially or economically disadvantaged small business concerns.

The 1978 amendments to section 8(a), Pub. L. No. 95-507, October 24, 1978, 92 Stat. 1757, were designed in part to give a statutory basis to the 8(a) program. See generally S. Rep. No. 95-1070, 95th Cong., 2d Sess. 13, reprinted in 1978 U.S. Code Cong. & Ad. News 3835, 3848. While SBA's authority to channel Federal contracts by regulation to socially and economically disadvantaged business concerns had been upheld in Ray Baille Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973), cert. denied 415 U.S. 914 (1974), Congress felt that by exercising direct legislative control over the 8(a) program it could insure that the program would more readily attain its goal of developing strong and viable disadvantaged small businesses. S. Rep. No. 95-1070, supra, at 14; 1978 U.S. Code Cong. & Ad. News at 3848. Congress also expressed concern that the 8(a) program needed to focus on the development of minority businesses in the "more sophisticated kinds of industries including manufacturing, construction and professional services." S. Rep. No. 95-1070, supra, at 11; 1978 U.S. Code Cong. & Ad. News at 3845.

The 1978 amendments to section 8(a) thus reflect a pervasive Federal policy of encouraging and fostering business ownership by socially and economically disadvantaged persons and promoting the viability of such businesses by providing contract, financial, technical and management assistance.

Pursuant to Pub. L. NO. 95-507, supra, the SBA is given broad statutory authority to enter into contracts with Federal agencies and to let subcontracts to socially and economically disadvantaged business concerns to attain the social policies now set forth in § 631. The amendments to 15 U.S.C. § 637(a)(1) in section 202 of the 1978 statute, 92 Stat. 1761, provide:

"It shall be the duty of the Administration [SBA] and it is hereby empowered, whenever it determines such action is necessary or appropriate--

"(A) to enter into contracts with the United States Government and any department, agency or officer thereof obligating the Administration to furnish articles, equipment, supplies, services, or materials to the Government or to perform construction work for the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent and responsible to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer.
* * *

"(C) to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work, services * * * as may be necessary to enable the Administration to perform such contracts." (Emphasis added.)

The thrust of SBA's 8(a) program is in large measure to insulate participants from the constraints of price competition with established firms. Price therefore, is not a factor in the selection of an 8(a) firm for a subcontract award by SBA, 13 C.F.R. 124.8-2 (1979), and SBA often provides its subcontractors with additional funds (business development expenses) over and above the contract price which it will obtain under its contract with the purchasing activity. Kings Point Manufacturing Company, Inc., 54 Comp. Gen. 913 (1975), 75-1 CPD 264. Thus normal competitive procurement practices would, of necessity, be required to give way to achieve the legislatively stated goal "to promote economic viability" of firms participating in the 8(a) program.

However, the Brooks Bill selection procedure is itself a special deviation from the traditional method of procurement in that competence, not price, is a basic selection criterion. In this respect, we do not equate "economic or social disadvantage" with the lack of professional competence, and therefore we see no inconsistency between the Brooks Bill selection procedures and the 8(a) program. Indeed at the time the bill was debated in the Senate, it was the view of the bill's supporters that this selection criterion would enhance the opportunities for smaller firms to obtain Government contracts for A&E services because the emphasis on low price was removed. 118 Cong. Rec. 36180 et seq., October 14, 1972.

In B-129709, October 14, 1976, we considered the legality of small business set-asides for A&E services generally in relation to the Brooks Bill, stating:

"It is clear that the Brooks Bill, which makes no reference to small business set-asides, manifests a Congressional intent that A&E services be acquired through competition that will produce the highest professional qualifications and competence. As a result, * * *

some procuring agencies believe that set-asides would be incompatible with the Brooks Bill. Other agencies, however, believe that the Bill and the Small Business Act can be read together so as to permit set-asides.

* * * * *

"It is a basic principle of statutory construction that statutes are presumed to be consistent with each other. 73 Am. Jur. 2d, Statutes § 254; 54 Comp. Gen. 944 (1975); * * *. Although a small business set-aside of an A&E procurement might preclude award to a firm that would be found to be the most highly qualified in an unrestricted procurement, we think the setting aside of an appropriate number of A&E procurements for small businesses and the awarding of a contract to the most highly qualified small business firm would not be inconsistent with the thrust of the Brooks Bill, which is to secure award of A&E contracts on the basis of technical excellence without regard to competitive pricing."

We believe that the 8(a) program should be similarly viewed, i.e., it is not inconsistent with the Brooks Bill to procure A&E services under the SBA 8(a) program.

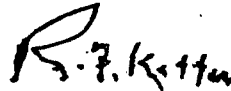
In this regard, we also note that the Brooks Bill defines the term "agency head" to mean the "Secretary, Administrator, or head of a department, agency or bureau of the Federal Government," 40 U.S.C. 541(2), a definition which would include the Administrator, SBA. 15 U.S.C. 533(a). The Brooks Bill also declares it to "be the policy of the Federal Government * * * to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification" and prescribes the procedures to be followed by an agency head in the selection of A&E firms to achieve the desired result. We see nothing in the 1978 amendments to the Small Business Act which would exempt the Administrator,

SBA from the constraints of the Brooks Bill in the award of a contract for A&E services. Therefore, contrary to the Commerce and SBA position, within the limitations of eligibility for participation in the 8(a) program, and to the extent the degree of competition required by 40 U.S.C. § 543 for selection of a firm for negotiation is reasonably available, award should be made on the basis of the criteria of the Brooks Bill and its implementing regulations. In our opinion, this conclusion recognizes the independent statutory authority of the Administrator to establish the 8(a) program, Ray Baille Trash Hauling, Inc. v. Kleppe, supra, yet remains consistent and harmonious with the basic policies established in the Brooks Bill.

In summary, we believe that the selection of an A&E under the 8(a) program, in compliance with the special statutory mandate for the selection of A&E contractors is not inconsistent with the basic premise upon which the 8(a) program is founded--to assist socially and economically disadvantaged persons achieve a competitive position in the market place. 13 C.F.R. 124.8-1(b) (1979). The statutory selection criteria for A&E contractors is not found in any other procurement statute and thus reflects what we believe to be a special procurement policy which was not intended to be limited without a specific statutory exception or other evidence of Congressional intent. Cf. 37 Comp. Gen. 271, supra; 38 Comp. Gen. 326 (1958); 49 Comp. Gen. 219 (1969). In this respect, there is no evidence, either in the Small Business Act itself or in the legislative history that the Congress intended to abrogate the Brooks Bill selection criteria in the procurement of professional A&E services under the 8(a) program. Thus, except in those instances where the Congress has clearly mandated a contrary result, e.g., Boyer, Biskup, Bonge, Noll, and Scott & Associates, Inc., 55 Comp. Gen. 765 (1976), 76-1 CPD 110 (case involving the award of an A&E contract without regard to the Brooks Bill under authority of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (1976)), the award of a contract for A&E services must, in our view, be governed by the

policy expressed in the Brooks Bill even though the zone of competition eligible for the award may be legally limited by other considerations.

The protest is denied.



Deputy Comptroller General
of the United States